Public Prosecutor v Rahmat bin Ghazali and another appeal

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS B-09–147–04 OF 2019 AND A-09–108–03 OF 2019
KAMALUDIN MD SAID, RAVINTHRAN AND NORDIN HASSAN JJCA
23 OCTOBER 2020

Criminal Procedure — Appeal — Notice of appeal — Public prosecutor filed notice of appeal against acquittal of respondent by High Court for offence under s 354 of Penal Code — Respondent filed preliminary objection under s 50(2) Courts of Judicature Act 1964 — Whether appeal of public prosecutor was confined to question of law only — Courts of Judicature Act 1964 s 50(2)

Criminal Procedure — Appeal — Notice of appeal — Respondent was acquitted by the magistrate court for offence under s 41(1) of the Road Transport Act 1987 — High Court dismissed appeal against respondent's acquittal — Appellant appealed against acquittal of respondent to Court of Appeal — Respondent filed notice of motion to strike out appellant's appeal — Whether questions of law must be disclosed in notice of appeal — Courts of Judicature Act ss 50(2) & 51

In Appeal No B-09–147–04 of 2019 in case of *Public Prosecutor v Rahmat bin Ghazali*, the respondent was convicted of an offence under s 354 of the Penal Code. Upon appeal to the High Court, he was acquitted. The public prosecutor filed a notice of appeal against the acquittal. At the outset of the hearing of the appeal, learned counsel for the respondent raised a preliminary objection based on s 50(2) of the Courts of Judicature Act 1964. He submitted that the two questions of law stated in the notice of appeal were not properly worded and that the same were not included in the petition of appeal. In the second appeal, ie Appeal No A-09–108–03 of 2019 in the case of *Public Prosecutor v Mohamad Pogi bin Abdul Lateb*, the respondent was charged with an offence under s 41(1) of the Road Transport Act 1987. The magistrate acquitted the respondent and the High Court dismissed the appeal against the said decision. The respondent filed a notice of motion in encl 25 to strike out the appeal on the ground that the petition of appeal disclosed only issues of fact or issues of mixed fact and law. Counsel for respondent argued that the appellant did not confine the appeal to issues of law only and therefore contravened s 50(2) of the Courts of Judicature Act 1964. However, counsel for the respondent in the second appeal did not argue the issues of law must be stated in the notice of appeal. The issues that fell for determination were whether the public prosecutor was required to state questions of law in the notice of appeal in respect of criminal appeals or revisions that originated from

the magistrates court and whether such appeals were only confined to questions of law.

Held, dismissing the respondent's preliminary objection and respondent's notice of motion in encl 25:

(1) **(per Ravinthran JCA, majority)** On a plain reading of s 50(2), two prerequisites applied to all appellants regardless of their status as the public prosecutor or as the aggrieved accused person. The first prerequisite was that prior leave must be obtained from the Court of Appeal and the second prerequisite was that the appeal must be confined to questions of law. However, s 50(3) uses the word 'notwithstanding' when referring to the prerequisite of obtaining prior leave. It did not say that s 50(2) had no application at all to the appeal of the public prosecutor. If words to that effect appeared in s 50(3), it was possible to argue that the public prosecutor was not only exempted from obtaining leave but was also exempted from limiting the appeal to questions of law. The court disagreed with the reasoning of Lamin Mohd Yunus PCA who opined that the public prosecutor's appeal was not confined to questions of law as he was the custodian of public interest. Such an argument was tenable only if the clear provision of the law exempted the public prosecutor from the restriction that had been placed generally on all appellants by s 50(2). Otherwise, one could also argue that the public prosecutor, by virtue of being the custodian of public interest, was exempted from other written provisions of the law as well which were of general application. The court was of the view that the appeals of the public prosecutor from decisions of the magistrates court in criminal matters that came before the court were confined to issues of law only (see para 9).

(2) **(per Ravinthran JCA, majority)** Regardless of whether the appeal of the public prosecutor was confined to questions of law only, there was no requirement to state questions of law in the notice of appeal filed by the public prosecutor. In fact, an aggrieved accused person was not obligated to state his questions of law in the notice of appeal either. None of the sub-s of s 50 stipulated that questions of law must be stated in the notice of appeal. Section 51 did not require questions of law to be stated in the case of appeals that emanated from the magistrates court. However, since an accused aggrieved person was obliged to obtain leave to appeal in respect of a criminal matter that originates from the magistrates court, it followed that questions of law would have to be necessarily disclosed at the outset in the leave application under s 50(2A) of the Courts of Judicature Act 1964 (see paras 10–11).

(3) **(per Nordin Hassan JCA, dissenting)** The public prosecutor was the guardian and the last bastion of public interest. Public interest needed to

be protected at all costs. In ensuring no injustice occurs in any case, even in the 'less serious' case, the power of the public prosecutor must not be curbed. The rights to appeal by the public prosecutor must not only on questions of law but also on question of fact or mixed law and fact in order to protect public interest as decided in the case of *Public Prosecutor v Pasupathy s/o Kanagasaby* [2001] 2 MLJ 143. For the interest of justice which the public prosecutor was tasked to protect, the interpretation of s 50 of the Courts of Judicature Act 1950 that allowed the public prosecutor to appeal on questions of law or fact or mixed law and facts must be adopted. In interpreting s 50 of the Courts of Judicature Act 1964, the purposive approach must be taken to ensure public interest was protected (see paras 25, 29 & 31).

[Bahasa Malaysia summary

Dalam Rayuan No B-09–147–04 Tahun 2019 dalam kes *Pendakwa Raya v Rahmat bin Ghazali*, responden disabitkan dengan kesalahan di bawah s 354 Kanun Keseksaan. Setelah membuat rayuan ke Mahkamah Tinggi, dia dibebaskan. Pendakwa raya telah mengemukakan notis rayuan terhadap pembebasan tersebut. Pada awal persidangan rayuan, peguam untuk responden mengemukakan bantahan awal berdasarkan s 50(2) Akta Mahkamah Kehakiman 1964. Beliau mengemukakan bahawa kedua-dua persoalan undang-undang yang dinyatakan dalam notis rayuan yang dikemukakan tidak tepat dan dan yang sama dengan yang tertera dalam petisyen rayuan. Dalam rayuan kedua, iaitu Rayuan No A-09–108–03 Tahun 2019 dalam kes *Pendakwa Raya v Mohamad Pogi bin Abdul Lateb*, responden didakwa melakukan kesalahan di bawah s 41(1) Akta Pengangkutan Jalan 1987. Majistret membebaskan responden dan Mahkamah Tinggi menolak rayuan terhadap keputusan tersebut. Responden mengemukakan notis usul di lampiran 25 untuk membatalkan rayuan dengan alasan bahawa permohonan rayuan tersebut hanya mendedahkan persoalan berkaitan fakta atau persoalan berkaitan kedua-dua fakta dan undang-undang. Peguam bagi responden berpendapat bahawa perayu tidak membuat rayuan hanya untuk persoalan berkaitan undang-undang dan oleh itu melanggar s 50(2) Akta Mahkamah Kehakiman 1964. Walau bagaimanapun, peguam bagi responden dalam rayuan kedua tidak membantah persoalan undang-undang mesti dinyatakan dalam notis rayuan. Isu-isu yang perlu ditentukan adalah sama ada pendakwa raya perlu untuk menyatakan persoalan undang-undang dalam notis rayuan berkenaan dengan rayuan kriminal atau pembetulan yang berasal dari mahkamah magistret dan sama ada rayuan-rayuan tersebut hanya terbatas pada persoalan undang-undang.

Diputuskan, menolak bantahan awal dan notis usul responden di lampiran 25:

(1) **(oleh Ravinthran HMR, majoriti)** Berdasarkan pembacaan biasa s

A 50(2), dua prasyarat diguna pakai untuk semua perayu tanpa mengira statusnya sebagai pendakwa raya atau sebagai tertuduh. Prasyarat pertama adalah bahawa kebenaran terlebih dahulu mesti diperoleh dari Mahkamah Rayuan dan prasyarat kedua adalah bahawa rayuan itu harus terbatas pada persoalan undang-undang. Walau bagaimanapun, s 50(3) B menggunakan perkataan 'walaupun' merujuk kepada prasyarat untuk mendapatkan kebenaran terdahulu. Itu tidak mengatakan bahawa s 50(2) sama sekali tidak memiliki permohonan untuk rayuan pendakwa raya. Jika kata-kata yang demikian terdapat di dalam s 50(3), terdapat kemungkinan untuk berpendapat bahawa pendakwa raya tidak hanya C dikecualikan untuk mendapatkan kebenaran tetapi juga dikecualikan dari batasan rayuan ke persoalan undang-undang. Mahkamah tidak setuju dengan alasan Lamin Mohd Yunus PCA yang berpendapat bahawa rayuan pendakwa raya tidak terbatas pada persoalan undang-undang kerana dia adalah penjaga kepentingan awam. Hujahan D seperti itu hanya dapat dilaksanakan jika peruntukan undang-undang yang jelas mengecualikan pendakwa raya dari sekatan yang telah ditetapkan secara umum pada semua perayu oleh s 50(2). Jika tidak, seseorang juga dapat berhujah bahawa pendakwa raya, oleh kerana menjadi penjaga kepentingan umum, telah dikecualikan dari E peruntukan undang-undang bertulis yang lain yang merupakan terpakai kepada umum. Mahkamah berpendapat bahawa rayuan daripada pendakwa raya daripada keputusan mahkamah majistret dalam perkara jenayah yang dihadapkan ke mahkamah hanya terbatas pada persoalan undang-undang (lihat perenggan 9).

F (2) **(oleh Ravinthran HMR, majoriti)** Tidak kira sama ada rayuan pendakwa raya terbatas pada persoalan undang-undang sahaja, tidak ada syarat untuk menyatakan persoalan undang-undang dalam notis rayuan yang difailkan oleh pendakwa raya. Orang yang dituduh juga tidak G diwajibkan untuk menyatakan persoalan undang-undangnya dalam notis rayuan. Tidak ada subseskyen dari s 50 yang menyatakan bahawa persoalan undang-undang harus dinyatakan dalam notis rayuan. Seksyen 51 tidak meletakkan persoalan undang-undang untuk dinyatakan dalam kes rayuan yang dikeluarkan dari mahkamah magistret. Namun, oleh H kerana seorang tertuduh diwajibkan mendapatkan izin untuk mengemukakan rayuan berkenaan dengan masalah jenayah yang berasal dari mahkamah majistret, maka persoalan undang-undang harus dinyatakan pada awalnya dalam permohonan kebenaran di bawah s 50(2A) Akta Mahkamah Kehakiman 1964 (lihat perenggan 10–11).

I (3) **(oleh Nordin Hassan HMR, menentang)** Pendakwa raya adalah penjaga dan benteng kepentingan awam yang terakhir. Kepentingan awam perlu dilindungi dengan sepenuhnya. Dalam memastikan tidak berlaku ketidakadilan dalam apa kes sekalipun, bahkan dalam kes yang 'kurang serius', kuasa pendakwa raya tidak boleh dihalang. Hak untuk

membuat rayuan oleh pendakwa raya bukan hanya pada persoalan undang-undang tetapi juga mengenai persoalan fakta atau campuran undang-undang dan fakta untuk melindungi kepentingan awam sebagaimana yang diputuskan dalam kes *Public Prosecutor v Pasupathy s/o Kanagasaby* [2001] 2 MLJ 143. Demi kepentingan keadilan yang ditugaskan untuk dilindungi oleh pendakwa raya, penafsiran s 50 Akta Mahkamah Kehakiman 1950 yang membenarkan pendakwa raya mengemukakan rayuan atas persoalan undang-undang atau fakta atau campuran undang-undang dan fakta mesti diterima pakai . Dalam menafsirkan s 50 Akta Mahkamah Kehakiman 1964, pendekatan melihat pada tujuan harus diambil untuk memastikan kepentingan umum dilindungi (lihat perenggan 25, 29 & 31).]

Cases referred to

Benjamin William Hawkes v PP [2020] 5 MLJ 417, FC (refd)
Datuk Hj Harun Hj Idris v PP [1976] 1 LNS 19, FC (refd)
Ooi Kean Thong & Anor v PP [2006] 2 CLJ 701, FC (refd)
Peguam Negara Malaysia v Nurul Izzah bt Anwar & Ors [2017] 4 MLJ 656; [2017] 5 CLJ 595, CA (refd)
Perbadanan Kemajuan Kraftangan Malaysia v DW Margaret a/p David Wilson (t/a Kreatif Kraf) [2010] 2 MLJ 713; [2010] 5 CLJ 899, FC (refd)
PP v Harmenderpall Singh a/l Jagara Singh [2007] 3 MLJ 433; [2007] 2 CLJ 577, CA (refd)
PP v Mahathir bin Muhammad [2013] 1 MLJ 50, CA (not folld)
PP v Pasupathy s/o Kanagasaby [2001] 2 MLJ 143, CA (folld)

Legislation referred to

Criminal Procedure Code s 51A
Courts of Judicature Act 1964 ss 50, 50(2), (2A), (3), 51
Federal Constitution art 8
Interpretation Acts 1948 and 1967 s 17A
Penal Code s 354
Road Transport Act 1987 s 41(1)

Nazran bin Mohd Sham (Deputy Public Prosecutor, Attorney General's Chambers) in Criminal Appeal Nos B-09–147–04 of 2019 and A-09–108–03 of 2019 for the appellant.
Afifuddin bin Ahmad Hafifi (Siti Sarah Khalil with him) (Salehuddin Saidin & Assoc) in Criminal Appeal No B-09–147–04 of 2019 for the respondent.
Chris Kooi Wei Kit (Ivy Chin with him) (Kit & Assoc) in Criminal Appeal No A-09–108–03 of 2019 for the respondent.

Ravinthran JCA (delivering majority judgment of the court):

INTRODUCTION

[1] This judgment is in respect of two preliminary issues that was raised in the two unrelated appeals from the magistrates court. We heard arguments on the said preliminary issues together as both issues turn upon the construction and effect of s 50 of the Courts of Judicature Act 1964. Briefly stated, the issues that fall for determination here are whether the public prosecutor is required to state questions of law in the notice of appeal in respect of criminal appeals or revisions that originate from the magistrates court and whether such appeals are only confined to questions of law. We were of the unanimous opinion that the public prosecutor is not required to state the questions of law in the notice of appeal. My learned brother Datuk Seri bin Kamaludin bin Md Said JCA and I were also of the opinion that the appeal of the public prosecutor must necessarily be confined to questions of law only. However, our learned brother Dato' Nordin bin Hassan JCA is of the view that the appeal of the public prosecutor can also address questions of fact as well.

BACKGROUND FACTS

[2] In Appeal No B-09–147–04 of 2019 (*Public Prosecutor v Rahmat bin Ghazali*), the respondent was convicted of an offence under s 354 of the Penal Code. Upon appeal to the High Court, he was acquitted. The public prosecutor filed a notice of appeal against the acquittal. At the outset of the hearing of the appeal, learned counsel for respondent raised a preliminary objection based on s 50(2) of the Courts of Judicature Act 1964. He submitted that the two questions of law stated in the notice of appeal were not 'properly worded' and that the same were not included in the petition of appeal.

[3] In the second appeal, ie Appeal No A-09–108–03 of 2019 (*Public Prosecutor v Mohamad Pogi bin Abdul Lateb*), the respondent was charged with an offence under s 41(1) of the Road Transport Act 1987. The magistrate acquitted the respondent and the High Court dismissed the appeal against the said decision. The respondent filed a notice of motion in encl 25 to strike out the appeal on the ground that the petition of appeal discloses only issues of fact or issues of mixed fact and law. In other words, counsel for respondent argued that the appellant did not confine the appeal to issues of law only and therefore contravened s 50(2) of the Courts of Judicature Act 1964. However, counsel for the respondent in the second appeal did not argue that issues of law must be stated in the notice of appeal.

SECTION 50

[4] Before discussing the arguments of the parties, for ease of reference, I reproduce below s 50 of the Courts of Judicature Act 1964.

> 50 Jurisdiction to hear and determine criminal appeals
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> (1) Subject to any rules regulating the proceedings of the Court of Appeal in respect of criminal appeals, the Court of Appeal shall have jurisdiction to hear and determine any appeal against any decision made by the High Court:
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> (a) in the exercise of its original jurisdiction; and
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> (b) in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by the Sessions Court.
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> (2) An appeal shall lie to the Court of Appeal, with the leave of the Court of Appeal, against any decision of the High Court in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by a Magistrates' Court but such appeal shall be confined to only questions of law which have arisen in the course of the appeal or revision and the determination of which by the High Court has affected the event of the appeal or revision.
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> (2A) An application for leave under subsection (2) shall be made within fourteen days after the date of the decision of the High Court.
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> (3) Notice of any appeal by the Public Prosecutor shall be signed by the Public Prosecutor, the Solicitor General or any other officer authorized by the Public Prosecutor; and notwithstanding subsection (2) no leave of the Court of Appeal is required.
>
> (4) Except as otherwise provided in this section, an appeal may lie on a question of fact or a question of law or on a question of mixed fact and law.

[5] The learned DPP submitted that the public prosecutor's appeal is not limited to questions of law only and therefore there is no requirement to state any issue of law in the notice of appeal. His reasoning is based on s 50(2) and 50(3) of the Courts of Judicature Act 1964 and the Court of Appeal decision in *Public Prosecutor v Pasupathy s/o Kanagasaby* [2001] 2 MLJ 143. Section 50(2) states generally that leave is required for appeals and revisions that originate from the magistrates court. It also states that the such appeals shall be confined to only questions of law. However, s 50(2) exempts the public prosecutor from the requirement of obtaining leave. He argued that the requirement of confining the appeal to questions of law is tied to the prerequisite of obtaining leave to appeal.

[6] In support, he cited the case of *Public Prosecutor v Pasupathy s/o Kanagasaby*. In that case, Lamin Mohd Yunus PCA reasoned that 'such appeal' in s 50(2) refers to 'appeal' that requires leave. For that reason, 'such appeal' must satisfy the prerequisite of disclosing the existence of questions of law. However, as the public prosecutor is not required to obtain leave, he is not

A required to disclose questions of law. His Lordship also opined that therefore, the appeal of the public prosecutor is not limited to questions of law and he is at liberty 'to re-examine every aspect of the case'.

B **[7]** On the other hand, counsel for respondent in the first appeal relied on the Court of Appeal case *Public Prosecutor v Mahathir bin Muhammad* [2013] 1 MLJ 50 where diametrically opposite views were expressed by Mohd Hishamudin JCA. His Lordship opined that the stipulation that appeals from magistrates court in criminal matters must be confined to questions of law apply equally to accused persons as well as the public prosecutor. The public C prosecutor is only exempted from applying leave to appeal under s 50(3). If s 50(3) also intended to exempt the public prosecutor from limiting his appeal to questions of law, the provision would have expressly stated so. In respect of the issue whether the public prosecutor must disclose questions of law at the outset in the notice of appeal, Mohd Hishamudin JCA said as follows:

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> In our opinion, since the appeal can only be on a question of law — and it must be purely a question of law; and not a question of mixed law and fact — the pure question of law must be clearly set out in the notice of appeal itself. The question of law ought not to be withheld by the party appealing until the time comes for the filing and serving the petition of appeal. It would not be fair to the respondent in the E appeal; it would be prejudicial to the respondent. From the time the notice of appeal is filed and right until the time when the petition of appeal is filed, the respondent should not be left wondering as to why the public prosecutor is still insisting on pursuing the matter against him.

F Mohd Hishamudin JCA also referred to art 8 of the Federal Constitution that states that all persons are equal before the law to support his argument that the public prosecutor should not be treated differently from an accused person.

Whether appeal of public prosecutor is confined to questions of law only?

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[8] I have given careful consideration to the argument of the learned DPP that the leave requirement is tied to the requirement of limiting the appeal to questions of law. Section 50(2) contains the words 'but such appeal shall be confined to questions of law'. Learned DPP, argued that 'such appeal' only H refers to an appeal where leave of court is required. Since, the public prosecutor's appeal does not require leave, according to the learned DPP, his appeal need not be confined to questions of law. This was also the view of Lamin Mohd Yunus PCA in *Public Prosecutor v Pasupathy s/o Kanagasaby* that I mentioned earlier.

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[9] In answering this question, I should think that it is important to read holistically all the subsections of s 50. Section 50 gives jurisdiction to the Court of Appeal to hear appeals from criminal matters decided in the High Court and it includes appeals from sessions court and magistrates court. However, s 50(2)

provides a limitation to the manner that appeals that emanate from magistrates court are brought to the Court of Appeal. It must be noted that s 50(2) provides generally and without qualification that 'an appeal shall lie to the Court of Appeal, with leave of the Court of Appeal'. It also enacts that 'such appeal' shall only be confined to questions of law. Therefore, on a plain reading of s 50(2), two prerequisites apply to all appellants regardless of their status as the public prosecutor or as the aggrieved accused person. The first prerequisite is that prior leave must be obtained from the Court of Appeal and the second prerequisite is that the appeal must be confined to questions of law. However, s 50(3) states that 'notwithstanding' s 50(2), no leave is required in the case of an appeal by the public prosecutor. Section 50(3) uses the word 'notwithstanding' when referring to the prerequisite of obtaining prior leave. It does not say that s 50(2) has no application at all to the appeal of the public prosecutor. If words to that effect appear in s 50(3), it is possible to argue that the public prosecutor is not only exempted from obtaining leave but is also exempted from limiting his appeal to questions of law. Therefore, on this point, I would respectfully agree with the reasoning of Mohd Hishamudin JCA but without the need to consider the equality provision of art 8 of the Federal Constitution. For the same reason, with the greatest of respect, I would disagree with the reasoning of Lamin Mohd Yunus PCA who opined that the public prosecutor's appeal is not confined to questions of law as he is the custodian of public interest. To my mind, such an argument is tenable only if the clear provision of the law exempted the public prosecutor from the restriction that had been placed generally on all appellants by s 50(2). Otherwise, one can also argue that the public prosecutor, by virtue of being the custodian of public interest, is exempted from other written provisions of the law as well which are of general application. In fact, as noted earlier, Parliament in enacting s 50(3) specifically exempted the public prosecutor from applying for leave but did not go further than that and exempt him from confining his appeal to questions of law only. In the premises, I am of the view that appeals of the public prosecutor from decisions of the magistrates court in criminal matters that come before this court are confined to issues of law only. As I said earlier, my learned brother Dato' Nordin bin Hassan JCA has a different opinion on this issue alone.

A B C D E F G H

Whether questions of law must be disclosed in the notice of appeal?

[10] In my opinion, regardless of whether the appeal of the public prosecutor is confined to questions of law only, there is no requirement to state questions of law in the notice of appeal filed by the public prosecutor. In fact, an aggrieved accused person is not obligated to state his questions of law in the notice of appeal either. None of the subsections of s 50 stipulate that questions of law must be stated in the notice of appeal. Section 51 which stipulates what goes into a notice of appeal, does not require questions of law to be stated in the case of appeals that emanate from the magistrates court. The provision reads as

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follows:

> 51 Notice of appeal
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> (1) Every appeal shall be by notice in writing which shall be filed with the Registrar of the Court from which the appeal lies at the place where the decision appealed against was given within fourteen days after the date of the decision.
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> (2) Every notice of appeal shall state shortly the substance of the judgment appealed against, shall contain an address at which any notices or documents connected with the appeal may be served upon the appellant or upon his advocate, and, except where the notice of appeal is given orally under section 54, shall be signed by the appellant or his advocate:
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> Provided that, in a case of an appeal under subsection 50(2), the computation of the aforesaid period of fourteen days shall commence from the date immediately after leave has been granted by the Court of Appeal.

[11] However, since an accused aggrieved person is obliged to obtain leave to appeal in respect of a criminal matter that originates from the magistrates court, it follows that questions of law would have to be necessarily disclosed at the outset in the leave application under s 50(2A). This is because s 50(2) enacts that the appeal that originates from the magistrates court 'shall be confined to only questions of law which have arisen in the course of the appeal or revision and the determination of which by the High Court has affected the event of the appeal or revision'.

[12] For the above reasons, I would respectfully disagree with the view expressed in *Public Prosecutor v Mahathir bin Muhammad* by Mohd Hishamudin JCA that the questions of law must be stated in the notice of appeal by the public prosecutor and that the accused would suffer prejudice if the same were only stated in the petition of appeal. With respect, I see no prejudice occasioned by the belated disclosure of the questions of law in the petition of appeal as given the various time frames governing filing notice of appeal, petition of appeal and case management hearings, the appeal proper would only be set down for hearing after reasonable notice is given to all parties.

CONCLUSION

[13] In conclusion, in respect of the first appeal, we unanimously ruled that the alleged improperly worded questions of law in the notice of appeal is a non-issue as there is no requirement to state the same. We therefore dismissed the preliminary objection. In respect of the second appeal, we unanimously dismissed the notice of motion as the public prosecutor has disclosed some questions of law in the petition of appeal. In the premises, we ordered that the appeals in both cases to be heard on their merits.

Nordin Hassan JCA (delivering dissenting judgment of the court):

[14] I had the opportunity of reading through the grounds of judgment of my learned brother Ravinthran Paramaguru JCA in draft. I agree with his view that that there is no requirement to state questions of law in the notice of appeal filed by the public prosecutor. However, contrary to Justice Ravinthran's opinion that the public prosecutor's appeal must confined to only questions of law, I am of the view that it does not.

[15] The backgrounds and the facts of the two appeals had been well spelled out in Justice Ravinthran's judgment and need no repetition here.

[16] The core issue here, is whether an appeal by the public prosecutor against the decision of the High Court in respect of criminal matter decided by magistrate's court shall only confined to questions of law. In this regard, reference to the relevant provisions is pertinent in analyzing and determination of the issue at hand. Section 50(2) and 50(3) of the Courts of Judicature Act 1964 which merit reproduction are as follows:

> Section 50(2)
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> *An appeal* shall lie to the Court of Appeal, *with the leave of the Court of Appeal*, against any decision of the High Court in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by a Magistrate's Court *but such appeal* shall be confined to only questions of law which have arisen in the course of the appeal or revision and the determination of which by the High Court has affected the event of appeal or revision.
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> Section 50(3)
>
> Notice of any appeal by the Public Prosecutor, the Solicitor General or any officer authorized by the Public Prosecutor; and *notwithstanding subsection (2) no leave of the Court of Appeal is required.* (Emphasis added.)

[17] It is clear that s 50(3) above stated, provides that, notwithstanding sub-s (2), no leave is required for the public prosecutor to appeal against the decision of the High Court in relation to any criminal matter decided by the magistrate court.

[18] The word 'notwithstanding' in sub-s 50(3) need no further interpretation as its literal meaning is clear which means inspite of. The Federal Court in the case of *Perbadanan Kemajuan Kraftangan Malaysia v DW Margaret a/p David Wilson (t/a Kreatif Kraf)* [2010] 2 MLJ 713; [2010] 5 CLJ 899 had discussed the meaning of the word 'notwithstanding' as follows:

> [19] Before reverting to consider s 35 PKKM Act 1979 it is provided in s 35 LPA Act 1976 that the exclusive right of an advocate and solicitor to appear in all Court of

A Justice in Malaysia is subject to the Act 1979 itself as well as any other written law. This could be read with s 35 Act 1979 which indicated earlier begins with the words 'Notwithstanding ...' *The term 'notwithstanding' means generally 'not to stand against it', or 'in the way' or overriding.*

B **[19]** Clearly, inspite of anything contained in sub-s 50(2), the public prosecutor is not required to obtain leave from the Court of Appeal in order to appeal against the decision of the High Court in respect of a decision on criminal matter by the magistrate court.

C **[20]** Further, sub-s 50(3) must be read together with sub-s 50(2) and one of the key words in sub-s 50(2), is the words 'such appeal' which are the following:

An appeal shall lie to the Court of Appeal, with the leave of the Court of Appeal, against any decision of the High Court in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by a Magistrate's Court *but such appeal shall be confined to only question of law* which have arisen in the course of the appeal or revision and the determination of which by the High Court has affected the event of appeal or revision.

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E **[21]** In my view, the words 'such appeal' in s 50(2) refers to said appeal with the leave of the Court of Appeal which does not applies to the public prosecutor as the public prosecutor is exempted from obtaining leave pursuant to sub-s 50(3). Hence, the appeal that confined only to the questions of law envisaged by sub-s 50(2), is the appeal that requires leave which only applicable to an accused person who intends to appeal against the decision of the High Court in respect of criminal matter decided by the magistrate court.

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[22] In regard to this issue, there are two conflicting views by this court in the case of *Public Prosecutor v Pasupathy s/o Kanagasaby* [2001] 2 MLJ 143 and *Public Prosecutor v Mahathir bin Muhammad* [2013] 1 MLJ 50.

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[23] It was held in *Mahathir Muhammad*'s case, that the notice of appeal filed by the public prosecutor must state the questions of law and the appeal by the public prosecutor must confined to only questions of law. The court was of the view that s 50(3) only exempts the public prosecutor from obtaining leave to appeal and nothing more. Further, the court opined that if the public prosecutor can appeal to the Court of Appeal on question of fact or question of mixed law and fact but the accused can only appeal on questions of law, it would be discriminatory in nature against the accused and not in harmony with the spirit of art 8 of the Federal Constitution.

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[24] Conversely, in *Pasupathy*'s case, it was held that pursuant to sub-s 50(3) and 50(2), the public prosecutor only need to file a notice of appeal and the appeal by the public prosecutor does not confined to only questions of law.

Lamin PCA, delivering the judgment of the court, had this to say:

> ... *Subsection (2), in my view was drafted especially for the benefit of an aggrieved accused person. As for the public prosecutor, he may avail himself of the provision of sub-s (2) because the phrase 'notwithstanding sub-s (2) found in sub-s (3)*. When an accused person desires to appeal, the full force of sub-s (2) comes into play. He has to apply for 'leave' and his appeal must be confined to only questions of law which have arisen in the course of the appeal or revision and the determination of which by the High Court has affected the event of the appeal or revision.
>
> ...
>
> *Now, sub-s (2) states 'An appeal shall lie to the Court of Appeal, with the leave of the Court of Appeal, but such appeal shall be confined to only questions of law'. (Emphasis added.) The words 'such appeal' must refer to the appeal 'with the leave' or requiring leave. So sub-s (2) is aimed to make provision for an appeal requiring leave. When leave is required to be applied for, it connotes that the applicant has to satisfy the court as to a certain condition; meaning that there must be a subject matter for arguments. In sub-s (2), the applicant must show whether or not there exist questions of law*. So, the existence or otherwise of the questions of law is the subject matter for the submission before the court. The applicant as we have said earlier, is no other than the aggrieved accused person. *On the other hand, the public prosecutor needs only to file a notice of appeal and for that purpose, it is expressly provided that no leave is required. That means there is nothing to submit before the court.*
>
> *With respect, we are of the view therefore that the public prosecutor is not required to show to the court that there are questions of law which arisen in the course of the appeal or revision and the determination of which by the High Court has affected the event of the appeal or revision*. (Emphasis added.)

[25] I am in agreement with the view in *Pasupathy*'s case and more so the public prosecutor is the guardian and the last bastion of public interest. Public interest need to be protected at all costs. In ensuring no injustice occurs in any case, even in the 'less serious' case, the power of the public prosecutor must not be curbed. In the present situation, the rights to appeal by the public prosecutor must not only on questions of law but also on question of fact or mixed law and fact in order to protect public interest.

[26] Take an example of an offence of outraging modesty under s 354 of the Penal Code, as in the case before us in Criminal Appeal No B-09–147–04 of 2019, as the High Court wrongly disturbed the finding of facts by the magistrate court and overturned the decision of the magistrate against the established evidence, the public prosecutor must has the rights to appeal in order to ensure justice to the victim. The public prosecutor must not be seen helpless although injustice was detected in a case. This is certainly not the intention of Parliament in enacting s 50 of the Courts of Judicature Act 1964. In *Mahathir Muhammad's* case, it was said that there is very minimal risk of real injustice if appeal to Court of Appeal should only confined to questions of law.

A However, a minimal risk is still a risk of real injustice which should not be allowed in our justice system.

[27] On the issue of guardian of public interest, this court in *Peguam Negara Malaysia v Nurul Izzah bt Anwar & Ors* [2017] 4 MLJ 656; [2017] 5 CLJ 595 had explained and held as follows:

> (2) *The appellant had locus standi and a special right to appeal in the public interest*. The appellant was undeniably a party at the leave application. His presence was required by law without being made a party to the proceedings. The relevant provision is found in O 53 r 3(3) of the Rules of Court 2012 which makes it mandatory for the applicant to give notice of the application to the Attorney General's Chambers. A failure to comply with the mandatory requirement to serve the cause papers on the Attorney General would result in the application being dismissed. It also makes the Attorney General the party representing the public interest at the point when the leave application is heard. Hence, when he appears before the court at that stage, the court has to recognise his presence and has no jurisdiction not to hear him. The putative party, the EC, was not a party at that particular point. *The appellant's position as guardian of public interest at this stage would necessarily include the right to appeal against an order granting leave.* (Emphasis added.)

[28] Although the above case is an election petition's case, the principle therein is relevant to issue in the present case.

[29] It is my view that in interpreting s 50 of the Courts of Judicature Act 1964, the purposive approach must be taken to ensure public interest is protected. This is also in consonance with s 17A of the Interpretation Acts 1948 and 1967 which states:

> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether the purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote the purpose or object.

[30] In a recent Federal Court case of *Benjamin William Hawkes v Public Prosecutor* [2020] 5 MLJ 417, the court adopted the purposive approach in interpreting s 51A of the CPC and held that the word 'shall' therein is not mandatory but only directory in nature. Zabariah Yusof FCJ delivering the judgment of the court said this:

> [48] The purposive rule of interpretation must be adopted in interpreting s 51A of the CPC, pursuant to s 17A of the Interpretation Acts 1948 and 1967 ...
>
> [49] It is clearly untenable in this case to allude to the word 'shall' as mandatory, *thus stultifying the justice of the case*when the document was not delivered to the accused persons before the commencement of the trial. (Emphasis added)

[31] Likewise in the instant case, for the interest of justice which the public prosecutor is tasked to protect, the interpretation of s 50 of the Courts of Judicature Act 1950 that allows the public prosecutor to appeal on questions of law or fact or mixed law and facts must be adopted.

[32] Next, on the issue of equality before the law as enshrined under art 8 of the Federal Constitution, our law accepted the doctrine of classification on the basis that the classification is permissible if it is founded on an intelligible differentia and the differentia has a rational relation to the object of the impugned law.

[33] The meaning of intelligible differentia and its application has been explained in the case of *Public Prosecutor v Harmenderpall Singh a/l Jagara Singh* [2007] 3 MLJ 433; [2007] 2 CLJ 577 as follows:

> [62] Going by the *Oxford English Dictionary*, 'intelligible' means: capable of understanding (not by senses) that may be apprehended by intellect, and 'differentia' means: the attribute by which a species is distinguished from all other species of the same genus; a distinguishing mark or character. In this instance, the differentia must have a rational relation to the object sought to be achieved by the statute in question. *The classification may therefore be founded on a different basis, namely geographical or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act. The classification should never be arbitrary, artificial or evasive. It must rest always upon real and substantive distinction bearing a reasonable and just relation to the thing in respect to which the classification is made for otherwise the classification made would be without any reasonable basis* — Mukherjee J in *Anwar Ali Sarkar*'s case 1952 AIR 75 and quoted in *Public Prosecutor v Su Liang Yu* [1976] 2 MLJ 128; [1976] 1 LNS 113 at p 130 (Emphasis added.)

[34] This doctrine of classification is further explained by Suffian LP in *Datuk Hj Harun Hj Idris v Public Prosecutor* [1976] 1 LNS 19 (FC) as follows:

> 7. In India discriminatory law is good law if it is based on 'reasonable' or 'permissible' classification, using the words used in the passage reproduced above from the judgment in Shri Ram Krishna Dalmia, provided that:
>
> (i) the classification is founded on an intelligible differentia which distinguishes persons that are grouped together from others left out of the group; and
>
> (ii) the differentia has a rational relation to the object sought to be achieved by the law in question. The classification may be founded on different bases such as geographical, or according to objects or occupations and the like. What is necessary is that there must be a nexus between the basis of classification and the object of the law in question.
>
> The Solicitor General submits that if the Indian doctrine of classification is to be accepted by our courts, which he argues has not been done, it may be accepted

A subject to the modification that the courts should not take it upon itself to consider whether the classification is reasonable or not, a task which should be left to the legislature. In our opinion the doctrine of classification should be accepted by our courts, subject to what we said in paragraph 6 above. We adhere to what was said in *Public Prosecutor v Khong Teng Khenat* p 170.

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[35] Reverting to the present case, sub-s 50(2) of the Courts of Judicature Act 1950 applies to all accused who intend to file an appeal against the decision of the High Court in respect of criminal matter decided by the magistrate court. Hence, the classification is reasonable and permissible and does not
C infringed art 8 of the Federal Constitution.

[36] On the same issue, Richard Malanjum FCJ in *Ooi Kean Thong & Anor v Public Prosecutor* [2006] 2 CLJ 701 had this to say:

D As regards art 8 judicial pronouncement on the scope of this article has been 'that equality before the law' requires that the cases of all potential defendants to criminal charges shall be given unbiased consideration by the prosecuting authority and that decision whether or not to prosecute in a particular case for a particular offence should not be indicated by some irrelevant consideration. Article 8(1) does not
E forbid discrimination in punitive treatment between one class of individuals and another class in relation to which there is some difference in the circumstances of the offence that has been committed (see *Nadaraiah v Public Prosecutor* [2000] 4 CLJ 634; *Public Prosecutor v Tengku Mahmood Iskandar* [1973] 1 MLJ 128; [1973] 1 LNS 124).

F Hence the reliance on art 8 by learned counsel in our view has no merit as there is no assertion that the applicants were singled out by DBKL in relation to the enforcement of the impugned by-law. There was also no allegation that irrelevant consideration was taken into account when DBKL decided to issue the summons to the applicants.

G Accordingly it is our judgment that the impugned by-law does not infringe any of the rights as enshrined in arts 5 or 8 of the Constitution.

CONCLUSION

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[37] In conclusion, it is my view that besides the public prosecutor is not required to state questions of law in the notice of appeal for an appeal against the decision of the High Court in respect of criminal matter decided by the magistrate court, the appeal by the public prosecutor is also not confined to
I only questions of law. The public prosecutor can raised question of fact or mixed law and fact in their appeal.

The respondent's preliminary objection and respondent's notice of motion in encl 25 dismissed.

Reported by Mohd Kamarul Anwar